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Author(s): Martyn Rady

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MARTYN RADY

Grünwald and Old Hungary

The name of 'Old Hungary' belongs to Béla Grünwald (1839–91) and to his eponymous study of Hungarian history from the Peace of Szatmár (1711) to the beginning of the Reform Period in the 1820s. Grünwald was not a historian by training but a lawyer, local politician and, after 1878, an MP. Although the son of a German father and Slovak mother, Grünwald was a leading exponent of magyarization and of the assimilation of the non-Hungarian nationalities which he saw as a necessary step in the making of a modern civil society. Regarded by his parliamentary contemporaries, however, as eccentric and doctrinaire, his political career did not prosper and he turned by degrees to writing. *Old Hungary*, published in 1888, won him acclaim and he was elected in the same year to the Hungarian Academy of Sciences.¹ In *New Hungary*, published just two years later, Grünwald brought together the craft of biography with the new science of psychiatry in a pioneering study of the Hungarian reformer and statesman, István Széchenyi (1791–1860). Like the subject of *New Hungary*, however, Grünwald took his own life, just a year after the book was published.²

Grünwald's account of eighteenth- and early-nineteenth-century Hungary is an examination of national decline. Grünwald takes successive

Martyn Rady is Professor of Central European History at UCL SSEES. This essay was made possible by the generosity of the Leverhulme Trust which awarded the author a two-year research fellowship in 2010–12. The author is grateful to Robert Gray, György Kurucz, István Szijártó and the anonymous reviewers of *SEER* for their comments and advice on the original submission.

¹ Republished as Béla Grünwald, *A régi Magyarország 1711–1825*, Budapest, 2001, with a conclusory essay by Attila Pók.

² Grünwald's biography and the circumstances of his death are given in Mihály Lackó, *Halál Párizsban. Grünwald Béla történész művei és betegségei*, Budapest, 1986. The reception of *A régi Magyarország* is discussed on pp. 105–31.

themes — the aristocracy, the church, the Diet, royal government and so on — and outlines the respective weaknesses of each, often in polemical style. He is particularly critical of the blindness of Hungary's nobility, which by its selfish manipulation undermined the institution of the counties and thus one of Hungary's main defences against Viennese mismanagement. Hungary's society of orders and the system of noble privilege stifled, moreover, the development of commerce and of a modern bourgeoisie, while simultaneously perpetuating the oppression of the peasantry. Grünwald thus repudiated the romanticized and broadly approving account of the eighteenth century given by Henrik Marczali in the first volume of his *Hungary in the Age of Joseph II*.³ Unsurprisingly, in view of his condemnation of noble privilege and championship of the peasantry, Grünwald was later embraced by a generation of Communist historians.⁴

In one short chapter of *Old Hungary*, Grünwald reviews the kingdom's judicial administration.⁵ In respect of the higher courts of the Curia, the Royal Table (*Tabula Regia*) and the appeal court known as the Table of the Seven (*Tabula Septemviralis*), he noted the terms of the judges' appointment, that they might be replaced at the royal pleasure, and that the ruler maintained an intrusive influence over judicial business and the work of Hungary's higher courts. Recruited from the ranks of the kingdom's leading lords and churchmen, the judges reflected the prejudices and interests of the social and political elite from which they were drawn. Most notoriously they began during the middle decades of the eighteenth century to clamp down on non-noble landholding, thus obliging freemen and others to sell off their properties.⁶ Their judgements were, moreover, often arbitrary and inconsistent, and they had no interest in establishing rules that might lend predictability to the legal process. Rather than reform the cumbersome and protracted procedures of the courts, the Curia judges stuck by tradition, refusing to embrace either innovation or any modern

³ *Magyarország története II. József korában*, 3 vols, Budapest, 1881–88. The relevant part is published in English as *Hungary in the Eighteenth Century*, Cambridge, 1910. For more recent writing on eighteenth-century Hungary, see Gabor Vermes, 'Eighteenth-Century Hungary: Traditionalism and the Dawn of Modernity', *Austrian History Yearbook*, 37, 2006, pp. 121–40 (pp. 122–23).

⁴ Discussed by Pók in the 2001 edition of *A régi Magyarország*, pp. 416, 439, 442.

⁵ Grünwald, *A régi Magyarország*, pp. 269–85.

⁶ Here Grünwald relies upon Gusztáv Wenzel, *Visszapillantás az előbbi magyar királyi curiának 1724–1769-iki működésére* (Ért. a társ. tud. köréből, 3, no. 8), Budapest, 1875, pp. 14–23, which, although narrowly conceived, is otherwise the only scholarly study of judicial decision making in Old Hungary.

conception of the law. The Curia's immobility was demonstrated in its judges' response to the Queen Empress's attempt to renew legal education — 'knowledge of the law derives from practice, not from theory' (*scientia autem juridica plus in praxi quam in theoria consistit*).⁷ The judges' refusal to reform procedure and reduce the grounds for litigation meant that a 'whole nation' was at war with itself in the courts, often in cases that went on for generations.

In respect of the lower courts, Grünwald was scathing. County and seigneurial courts practised a partisan justice, and did so bloodily. The justice that they meted out was arbitrary and their punishments were discretionary and often cruel. Visitors thus noted the many scaffolds erected across the Hungarian countryside. Peasants in litigation with their lords had perforce to pursue their suits through the lords' own courts, which tilted the legal process in the lords' favour. For their part, the county courts were agencies of noble hegemony and they provided an empty remedy against injustice. Most of the judges in the lower courts were not only intent upon preserving privilege but also unlettered and merciless. Here Grünwald gives the example of a slumbering judge who upon being roused pronounced himself in favour of the death penalty, even though the case before the court was a civil action. Thus, eight to nine million people were effectively condemned to a life outside the law, for the courts were under the control of the privileged orders whose interests they habitually served. Joseph II, by breaking the arbitrary power of the county and seigneurial courts and by centralizing the judicial administration, sought to reform the law for the benefit of ordinary Hungarians and to render them citizens with equal access to the courts. With his untimely death, just as with Matthias Corvinus's exactly three hundred years before, justice perished in Hungary.⁸

Grünwald presents a highly distorted picture of legal conditions in Old Hungary and one which critics were swift to challenge and correct. (Most obviously, peasant-landlord disputes were adjudicated not by the landowner, but by agents of the county).⁹ Nevertheless, Grünwald's contention that Hungary's judges acted according to class interests, were

⁷ In fact, the Curia was anything but immobile in this matter. See Endre Varga, 'A hivatalos ügyvédi osztály kialakulása', in *Emlékkönyv Domanovszky Sándor*, Budapest, 1937, pp. 624–42 (pp. 635–47).

⁸ Here Grünwald buttresses his case with several ditties (*A régi Magyarország*, p. 284).

⁹ Lajos Mocsáry, *A régi magyar nemes. Észrevételek Grünwald Béla 'A régi Magyarország' című munkájára*, Budapest, 1889, pp. 126–27; Imre Palugyay, *Megye-Hivatalok*, Pest, 1844, p. 152.

uninterested in change and participated in the peasantry's oppression continues to be repeated.¹⁰ We will show in what follows that Grünwald was mistaken in his description of the composition of the courts, of the law by which they judged and of the penalties that they imposed. Nevertheless, our purpose in referring to *Old Hungary* is larger than proposing a straw man or a convenient chronological peg upon which to hang the title of this essay. (We will in any case occasionally stray outside *Old Hungary*'s periodization). It is that, extraordinarily, Grünwald is one of just a handful of Hungarian historians to have concerned themselves, however briefly, with judicial behaviour and the considerations that guided court decisions. In this respect, his discussion, albeit polemical, stands apart from the assumptions of most historians, particularly those writing from within civil jurisdictions, of which Old Hungary was in respect of its procedural law indubitably a part. For these, the judge should be regarded not as an 'oracle of the law' but as a kind of 'expert clerk', whose activity in mechanically fitting the facts of the case to the most appropriate piece of legislation or other canonical sources of the law, is of only technical interest. More recent scholarship has, however, indicated that even in civil jurisdictions, judges retain larger interpretative and creative scope than that afforded by syllogistic reasoning.¹¹

In what follows, we attempt to show how judicial decisions were made in Old Hungary in a way that goes beyond not only Grünwald's rhetoric of hierarchical injustice but also the Formal Legalism that is implicit in most other historical writing on Hungarian court practice.¹² Our account will deal only in passing with the reforms of Joseph II since, as Grünwald lamented, they were too short-lived to have had any enduring influence on

¹⁰ Béla K. Király, *Hungary in the Late Eighteenth Century: The Decline of Enlightened Despotism*, New York and London, 1969, pp. 87–88, extensively repeats Grünwald; likewise, Lajos Hajdú, *Az első (1795-os) magyar büntetőkódex-tervezet*, Budapest, 1971, pp. 30–32. See also Jozef Beňa and Tomáš Gábriš, *History of Law in Slovakia (Until 1918)*, Bratislava, 2008, pp. 28–30; György Bónis, Alajos Degré and Endre Varga, *A magyar bírósági szervezet és perjog története*, Zalaegerszeg, 2nd edn, 1996, p. 98.

¹¹ See here in particular, Peter Stein, 'Civil Law Reports and the Case of San Marino', in Okko Behrends et al. (eds), *Römisches Recht in der europäischen Tradition*, Edelsbach, 1985, pp. 323–38; Peter G. Stein, 'Roman Law, Common Law, and Civil Law', *Tulane Law Review*, 66, 1991–92, pp. 1591–1603; J. H. Baker, 'Case-Law in England and Continental Europe', in Baker, *The Common Law Tradition: Lawyers, Books and the Law*, London and Rio Grande, OH, 2000, pp. 107–15; for syllogistic reasoning by civil law judges, see John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd edn, Stanford, CA, 2007, pp. 34–38.

¹² For Formal Legalism and the 'official theory' of judicial behaviour, see Richard A. Posner, *How Judges Think*, Cambridge, MA, 2008, pp. 41–56.

the organization and conduct of Hungary's courts. Like Grünwald, we will not include Transylvania in our discussion. Although Old Transylvania's judicial structure was akin to Old Hungary's, its higher courts were subject to greater political interference, its landlords practised a more complete authority over their tenants and its internal legal arrangements were complicated by the persistence of large privileged territories that adhered to very different local laws.¹³

Customary Law and the Courts

The law in Old Hungary was customary in the sense that it rested on tradition and much of it was not written down. There was no single customary law in Hungary. The nobility lived by their own law which was 'countrywide' (*országos*) in the sense that it applied to all noblemen throughout the kingdom (including Transylvania). A part of the law of the nobility, mostly as it affected landholding and how noblemen might pursue cases in court, was published in 1517 by the lawyer and politician, Stephen Werbőczy, and his account, the *Tripartitum*, retained considerable authority until 1848.¹⁴ Privileged communities — chartered towns, the territories of the Jazygs and Cumans on the Great Plain, semi-nobles on ecclesiastical estates and so on — lived under their own customary arrangements. Counties, market towns and even individual villages had their own customs, most of which were preserved only in memory and oral tradition. Although invested with the weight of history, customary arrangements might be overturned by statutes of the Diet and by royal decree. It was, however, generally accepted that the privileges of the nobility and the manner in which they might hold and succeed to land were inviolable. Even so, a cowed Diet surrendered in 1687 the nobility's right both to elect the ruler and to lawfully resist him, while eighty years later, Maria Theresa interfered by decree directly in the hitherto private relationship between noble and peasant, specifying the obligations of tenants to their lords.¹⁵

The structure of courts mirrored the organization of the law. The nobility pursued their suits before the courts of the county or, where weightier concerns were at stake (as they often were), in the Curia. Townsfolk went

¹³ For Old Transylvania, see Bónis, Degré, Varga, *A magyar bírósági szervezet*, pp. 124–29.

¹⁴ *Tripartitum opus iuris consuetudinarii incliti regni Hungariae*, published with an English translation by János Bak et al. (eds), *The Customary Law of the Renowned Kingdom of Hungary (Decreta Regni Mediaevalis Hungariae*, 5), Budapest and New York, 2005.

¹⁵ For the 1767 Urbarium regulating peasant obligations, see R. W. B. Gray, *Land Reform and the Hungarian Peasantry c. 1700–1848*, unpublished PhD thesis, University College London, 2009, pp. 34–46.

before their own courts, although they might by appeal take cases to one of several royal courts, principally the court headed by the Magister Tavernicorum (*tárnokmester*).¹⁶ Peasants and members of market towns sued before village or local courts, although more serious matters usually went before the seigneurial courts. On top of this, there were tribunals that might be variously attached to the jurisdictions of towns, landowners and villages, or be linked through supervisory and appeal mechanisms to the central royal courts or, even further afield, to agencies in Vienna. This group included market courts, woodland courts, vineyard courts, mining courts, garrison and regimental courts, as well as such informal bodies as 'young people's courts', Roma courts and presbyteries that exercised their own discipline and administered their own penalties.¹⁷

Within this fragmented system we may identify two types of law. The first of these, as followed by the majority of lower level courts — county, seigneurial, village and so on — rested on custom that derived, albeit imperfectly, from communal approbation and from social practice. For the most part, this law was transmitted through memory and recollection. Some communities did, however, seek to put their customs in writing and many issued written regulations to deal with new circumstances that required a legal response but where the existing law of custom was uncertain.¹⁸ Some of these regulations subsequently became embedded in popular practice and thus acquired a customary character of their own; others fell into desuetude. The second variety of law, at work in the Curia and in the other royal courts, was lawyerly and it was informed by legal erudition and written sources of authority. It was founded less upon notions of communal will and traditional practices, as upon texts and a historic reading of the law. The different types of law followed in Hungary's courts affected the way that the courts themselves were composed, the manner in which the law was understood, and the character of judicial decision making.

¹⁶ The office went back to the eleventh century and originated as an institution of royal purveyance. The root, *tavar/towar*, has nothing to do with taverns but is Slavonic for goods or wares.

¹⁷ For Roma courts, see Kamill Erdős, 'Cigány-törvényszék', *Néprajzi Közlemények*, 4, 1959, pp. 203–14; for presbyteries, Katalin Jávor, 'Egy 19. századi presbiteri jegyzőkönyv tanulságai', in Gyula Ortutay (ed.), *Népi kultúra – Népi társadalom*, Budapest, 1971, pp. 71–103 (pp. 74–75); for young people's courts, see Ernő Tárkány Szűcs, *Magyar jogi népszokások*, Budapest, 1981, pp. 175–77.

¹⁸ See *Corpus Statutorum Hungariae Municipalium* (A magyar törvényhatóságok jogszabályainak gyűjteménye), eds Sándor Kolosvári and Kelemen Övári, 5 vols in 7 parts, Budapest, 1885–1904.

Custom and the Lower Courts

The customary law that was followed in villages, counties, market towns and seigneurial jurisdictions rested its authority mainly on social observance and traditional practice. This was unproblematic in respect of such matters as robbery and assault, where the crime involved was obviously an infraction, or in respect of procedures, such as for debt, where the proper legal processes were known. Other matters were less certain, as for instance acts of vengeance, drunken revelry and many of the disputes arising from property ownership, especially of vineyards. Although certain conventions might exist, there were no rules of recognition by which to determine whether these were of general application, still less whether they constituted legal norms. Large parts of the law accordingly remained uncertain. There were thus no general principles guiding pre-emption in respect of land sales, nor any fixed rules regarding the sequestration of farmland that had been neglected; each case had, instead, to be adjudicated according to its merits. On top of this, new circumstances might arise which required a legal response, but where the law of custom was silent, or existing customary arrangements be found to lead to unfair outcomes. Under these circumstances, where custom was unsure or its applicability in concrete cases uncertain, it made sense to refer to the community out of whose habits and practices the law of custom was held to derive in the first place. Accordingly, a part of the customary law as it developed in Hungary acquired the character of a law that was collectively found, and which developed in individual communities by way of common consent and popular approbation. We should not, of course, imagine that the judgements and decisions given out in this way were arrived at democratically, or that they were fashioned in a complete legal vacuum. The flow of personnel between local and higher courts and the dissemination of legal texts, most notably volumes of penal law originating in Austria and the German lands, made for a certain uniformity, while the procedures followed in individual courts also tended to converge.¹⁹ Nevertheless, the manner in which verdicts were reached and the law determined reflected the notion that the law might be communally determined and defined according to the collective will.

¹⁹ Gábor Béli, 'Strafrechtspraxis und Strafrechtswissenschaft in Ungarn im 18. Jahrhundert', in Barna Mezey (ed.), *Strafrechtsgeschichte an der Grenze des nächsten Jahrtausendes*, Budapest, 2003, pp. 110–21 (pp. 113–14); István Kállay, *A magyarországi nagybirtok kormányzata 1711–1848*, Budapest, 1980, p. 239.

At the lowest level, the village court, judgement was made by the headman and between four and twelve sworn village elders. These were usually elected by the village, with the approval of the local lord.²⁰ For the most part, village courts adjudicated minor disputes up to a value of just a few florins and petty misdemeanours, but some had a much larger authority, including the right to judge capital crimes.²¹ When tricky points of law needed resolution or a serious offence was involved, then the village might participate in the court's discussions. In Calvinist communities where the presbytery functioned as the local court, the whole congregation might be involved.²² In market towns and smaller urban centres, analogous arrangements prevailed with an 'outer council' or 'senate' joining in the adjudication of weightier cases.²³ Vineyard courts, which exercised an authority over conduct on the terraces as well as in property disputes, also relied upon extensive popular participation; woodland courts less so, mainly because their jurisdiction was limited to a narrow range of easily-proven offences.²⁴ Decisions in respect of the law and of its application to individual cases that were arrived at locally might thus be made on behalf of 'the whole community', 'from our common decision' and according to 'the law of our fathers'.²⁵

²⁰ Vilmos Sápi, 'Községi biráskodásunk a feudálizmus utolsó évszázadaiban', *Jogtudományi Közlöny*, NS, 21, 1966, pp. 466–72 (pp. 467–68).

²¹ Ferenc Eckhart, *A földesúri büntetőbiráskodás a XVI–XVII. században*, Budapest, 1954, p. 10. Sentence of death required, however, the landowner's approval and, in most cases after 1781, the consent of the ruler. See Lajos Hajdú, *Büntetés és büntetés Magyarországon a XVIII. század utolsó harmadán*, Budapest, 1985, pp. 127–28.

²² István Kállay, *Úriszéki biráskodás a XVIII–XIX. században*, Budapest, 1985, p. 75; Jávor, 'Egy 19. századi presbiteri jegyzőkönyv', p. 73.

²³ Antal Miskei, *Ráckeve története a kezdetektől 1848-ig*, Ráckeve, 2003, p. 307; László Novák, *Nagykőrös története és néprajza a XIX. század közepéig*, Nagykőrös, 1994, p. 333; József Nagy, *Eger története*, Budapest, 1978, p. 208; István Szűcs, *Debreczen története*, Debrecen, 1870–72, pp. 510–12.

²⁴ Most woodland offences were dealt with on the spot, according to a fixed schedule of fines. See thus, Hungarian National Archive (Magyar Országos Levéltár, hereafter, MOL), P275, Festetics cs. keszthelyi levéltár, *Birtokgazdálkodási iratok*, Bundle 160, 'Strafprotokoll'. More serious cases of damage might be referred to the village assembly. See *Corpus Statutorum*, 1, pp. 406–07; Károly Tagányi, *Magyar erdészeti oklevéltár*, 3 vols, Budapest, 1896, 1, p. 723. For vineyard courts and assemblies, see András Lichtneckert, *A balatonfüredi szőlőhegy és szőlőhegyi önkormányzat története*, Balatonfüred, 2008, pp. 197–98; Melinda Égető, *Helytörvények forrásközléseinek gyűjteménye (1470–1846)*, Budapest, 2002, p. 131.

²⁵ Etele Thury, 'Az Óvárhoz tartozó városok és falvakban levő birák és községek rendtartása 1635-ből', *Történelmi Tár*, 1905, pp. 572–89 (p. 572); Lajos Kemény, 'A forrói jobbágyok rendtartása 1601. előtt', *Magyar Gazdaságtörténelmi Szemle*, 8, 1901, pp. 415–16; Tagányi, *Magyar erdészeti oklevéltár*, 2, pp. 61–63. See also, István Imreh, *A rendtartó székhely falu*, Bucharest, 1973, pp. 93, 102, 107.

The seigneurial courts belonging to the landowning nobility likewise sought through their composition to capture communal apprehensions of what the law actually was. Rather than being instruments of the landlord's discretionary power, as Grünwald described them, the courts in Hungary's individual lordships drew upon a wide membership. The lord himself seldom attended, although he appointed the court's presiding officer.²⁶ In smaller lordships, where the burden of holding courts was too onerous, landowners often also referred cases directly to the county, thus giving over their jurisdictional responsibilities.²⁷ Participation at seigneurial courts varied according to availability, but regularly included village elders, freemen (*libertini*, often postal clerks or waggoneers), estate bailiffs, citizens of nearby towns, tax collectors, the local preacher and headmaster as well as representatives of the county administration.²⁸ Altogether, the number of those attending seigneurial courts in a judicial capacity regularly numbered between sixteen and twenty, thereby diminishing both the landlord's influence and, indeed, the weight of the noble estate more generally in matters affecting the lives of ordinary Hungarians. Certainly, the numbers attending seigneurial courts in a judicial capacity went into decline towards the end of the eighteenth century. As seigneurial jurisdiction became absorbed within the burgeoning county administration, membership of seigneurial courts was increasingly confined to the corps of professional magistrates and judges who dispensed justice in the counties and ridings (*járások, processus*).²⁹ Since after 1790 it was possible to appeal cases from the seigneurial to the county courts, the merger of their membership made obvious sense. Nevertheless, it was only on the eve of emancipation that the first comprehensive accounts of the laws and procedures to be followed in seigneurial courts were published, and then only as private manuals of instruction.³⁰

²⁶ For the continued attendance of landlords at seigneurial courts, see Pest County Archive (Pest Megyei Levéltár, Budapest, hereafter, PML), IV – 87a, Uriszéki iratok, Fóti uradalom, Box 1, *Jegyzőkönyv*, 1835; MOL, P88, Dessewffy család, *Familiaria*, Bundle 5, fasc. 79, fols 1–8. In the second example, dating from 1820, the court is even chaired by the lord.

²⁷ Kállay, *A magyarországi nagybirtok kormányzata*, p. 232.

²⁸ Lajos Horváth, 'Közsegi közigazgatás Pest megyében a xvii–xviii. században', in Tibor Egey (ed.), *Fejezetek Pest megye történetéből. Tanulmányok*, Budapest, 1990, pp. 137–97 (p. 154); Eckhart, *A földesúri büntetőbiráskodás*, pp. 26–30.

²⁹ Palugyay, *Megye-Hivatalok*, pp. 143–44, 152; Eckhart, *A földesúri büntetőbiráskodás*, p. 30.

³⁰ See thus, Carolus Pfahler, *Jus Georgicum Regni Hungariae*, Keszthely, 1820. Pfahler's study is remarkable in its attempt to bring together legislation of the Diet, decrees of the ruler, decisions of the courts, the texts of royal privileges and customary practices. I am

Far from being solely instruments of the noble power, the courts of the counties were also diverse in their composition. Certainly, the *sedes iudicaria* or *sedria*, the principal organ of county justice, together with its subordinate magistrates' courts in the ridings, were staffed exclusively by noble judges and assessors, who were frequently elected by the noble community.³¹ These courts were more lawyerly than the seigneurial and village courts, for the principal officer, the *alispán* (deputy sheriff; the High Sheriff or *főispán*, a royal appointee, seldom bothered himself with routine county business), as well as the several 'judges of the Table' (*táblabirák*) had usually received some formal education in the law. Indeed, service as an *alispán* was regarded by the early nineteenth century as part of the career path that might take an aspiring lawyer to the office of judge of the Curia.³² Parties involved in litigation were often attended by their attorneys. As a consequence of the more lawyerly composition of its courts, the law followed in the counties stood increasingly close to the law at work in the Curia and royal courts.

Normally, the county *sedria* consisted of up to a dozen or so judges, even on such occasions as when it went into emergency session because the gaol was full.³³ It was difficult, however, to extend this number because the county courts were so busy as to make unreasonable demands on the time of all but a small number of salaried officers. Indeed, by the nineteenth century, many county courts were in more or less permanent session.³⁴ Nevertheless, where points of law needed discussion, instances of outlawry to be reviewed, or a case of particular weight launched, the matter might be referred to the county assembly for direction. By the second half of the eighteenth century, county assemblies were usually held monthly, often at different venues, and they had a notably varied membership. All noblemen were expected to attend sessions of the assembly, although it was a frequent complaint of county officers that too few actually did so. Besides noblemen, there were often in attendance village headmen, wealthy peasants, members of the local garrison, representatives of nearby towns, delegates of villages of petty nobles, distinguished visitors (like, for instance, the head of the University's Law Faculty), as well as the 'many

grateful to György Kurucz for drawing my attention to this important but neglected work.

³¹ The relative weight of the *főispán* and the county community in selecting county officers differed from place to place, and over time.

³² Endre Varga, *A királyi curia 1780–1850*, Budapest, 1974, pp. 164–65.

³³ *Corpus Statutorum*, 4/1, p. 447.

³⁴ Iván Mesznerics, *A megyei büntető igazságszolgáltatás a 16–19. században*, Budapest, 1933, p. 22.

others' whom the county notaries thought too minor to be recorded by name.³⁵

In the manner in which they conducted their business, Hungary's village, town, seigneurial and county courts sought to give voice to a communal understanding of the law, enlisting either the community or what might loosely be considered its representatives as participants in the legal process. Judicial decisions were thus arrived at collectively, by consensus and agreement. At times, it is certainly possible to determine the factors that led to a judicial outcome, where the influence of a local lord in forcing through a solution satisfactory to himself is visible, or the efforts of a particularly energetic pastor.³⁶ On other occasions, we may note the way that imagination of a plague of cannibals gripped a county community, with fatal consequences for the local Roma population.³⁷ Most cases, however, show less dramatic events and less obvious suasions, where what was thought to be good and reasonable was used to achieve a solution that was acceptable to members of the court, but of which the surviving record gives only the decision, not the manner by which it was reached.

A part of the work of the lower courts that we have described involved matters of property. In this respect, the law was highly proceduralized, to a large extent borrowing the stages of the action and the modes of proof from processes followed in the higher courts.³⁸ Accordingly, the law was relatively easily determined and often a matter of simply following established rules. In many cases, the justice of the plaint was evident and the court's role simply one of enforcement. A particular difficulty was that peasants often concluded contracts that were too simply composed to cope with unforeseen circumstances and that adjudication was accordingly

³⁵ Alajos Degré, 'Megyei közgyűlések a xvi–xvii. századi török háborúk korában', in György Bónis and Atajos Degré (eds), *Tanulmányok a magyar helyi önkormányzat múltjából*, Budapest, 1971, pp. 35–52; András Borosy (ed.), *Pest-Pilis-Solt vármegye közgyűlési jegyzőkönyveinek regesztái 1712–1740*, 7 vols, Budapest, 1989–96, 7, pp. 96, 174, 232. Peasants might, however, be refused a voice in the assembly's deliberations. See Éva H. Balázs, Lilla Krász and György Kurucz, *Hétköznapi élet a Habsburgok korában 1740–1815*, Budapest, 2007, p. 94. For the head of the Law Faculty, see Hungarian National Library (Országos Széchenyi Könyvtár, hereafter OSzK), MSS, *Krassóvármegyei jegyzőkönyv 1779–82*, Fol. Lat. 3901, fol 1.

³⁶ Eckhart, *A földesúri büntetőbiráskodás*, p. 20; Kálmán Révész, 'A presbyterium legelső nyomai hazai református egyházunkban', *Protestáns Szemle*, 4, 1892, pp. 419–46 (p. 431).

³⁷ Hajdú, *Bűntett és büntetés*, pp. 10, 122; Hajdú, *Az első (1795-os) magyar büntetőkódex-tervezet*, pp. 52–53.

³⁸ Kállay, *Úriszéki biráskodás*, pp. 141–59, 327–445; Kállay, *A magyarországi nagybirtok kormányzata*, p. 239.

needed to unravel the commitments they had entered into, particularly if a debt had been subsequently sold on.³⁹ A midway position between rival claims often proved expedient in these circumstances — likewise in such contentious matters as rights to woodland and to tavern keeping, where the laws of property directly confronted popular notions of 'moral ownership'.⁴⁰ In more complicated commercial disputes, local practice tended to borrow from the norms followed in the towns; likewise, intestacy adhered in respect of legal succession to conventions that were widespread. Very many private actions might therefore come before a local court — the magistracy of the market town of Ráckeve was dealing with several hundred a year by the 1830s.⁴¹ Most, however, were capable of speedy and satisfactory resolution. The more complicated cases involving the property rights of noblemen (who usually had extensive written evidence at hand to support or rebut a claim) were too much for the lower courts. Although some of the opening stages of an action might be performed at the county assembly, they otherwise went straight to the Curia for adjudication. Generally, only a handful a year were heard by the county *sedria*.⁴²

Criminal cases were, likewise, driven by procedural norms that had their origins in practices more generally observed. By the eighteenth century, most cases were handled 'inquisitorially' with a prosecutor (*fiscalis, magistratus, ordinarius*), who had usually received some legal education, gathering the evidence of witnesses and taking a statement of the accused.⁴³ The questions put to the accused and recorded in the so-called *Deutrum* (*De eo utrum*) followed a set pattern and were written up verbatim by the prosecutor at the time of interrogation. It was common for the culprit to admit his guilt almost at once, for most crimes were 'manifest', and indeed it was in his interest to do so, for otherwise he might be put under torture to confess. (It was widely held that capital punishment

³⁹ For typical peasant contracts, see MOL, P86, *Dessewffy család*, Bundle 50, fols 98ff. For peasant debts being contracted through bills of exchange, see István Kállay, 'Világos adóssági per és csődeljárás az úriszékben', *Jogtörténeti Tanulmányok*, 5, 1983, pp. 129–41 (p. 133).

⁴⁰ *Corpus Statutorum*, 1, p. 376; Tagányi, *Magyar erdészeti oklevéltár*, 1, pp. 479, 603. See also, Gray, *Land Reform and the Hungarian Peasantry*, p. 70.

⁴¹ PML, V180 A (a), *Ráckeve tanácsi iratai*, vol. 8, 1833, 1834 (unpaginated).

⁴² András Borosy, Katalin Kisfaludy and Attila Szabó (eds), *Pest-Pilis-Solt vármegye közgyűlési iratainak regesztái. Igazságszolgáltatási iratok*, 3 vols, Budapest, 1998–2000, 3, *passim*.

⁴³ Prosecutors and their offices had become largely professionalized by the beginning of the nineteenth century. See András Molnár, 'Zala megye közigazgatása 1790–1848', in Molnár (ed.), *Zala megye archontológiája 1138–2000*, Zalaegerszeg, 2000, pp. 61–79 (p. 77).

first required a confession).⁴⁴ Even after the abolition of torture in 1776, a suspect might still expect some 'softening up' by the constable (*hajdú*) and, should he remain recalcitrant, a period in custody. If the evidence was not conclusive, the suspect might still be taken to court on the grounds of 'likelihood', although his penalty was reduced should he then be found guilty. Since previous convictions were known to the court (they were given in the *Deutrum*), 'likelihood' retained a powerful place in the criminal law in Hungary, as indeed elsewhere.⁴⁵

The difficulty for courts lay in knowing what constituted a crime and what penalty it merited. The standard manuals of criminal law contained categories so broad as to be almost meaningless and advocated the supreme penalty for most of these. It was generally, however, accepted that local custom might modify arrangements, providing it did not go against the few provisions included in statute law. Accordingly, communities tended to dispense with close substantive definitions and to convict instead according to such vague categories as *vita scandalosa* or *rosszaság* (literally, 'badness') and promiscuity or *paráznaság*. In these cases, the content of the law was principally what opinion at the time deemed it to be.⁴⁶ So, for instance, as late as the 1830s, a young man in Pest County was brought before the seigneurial court of the Grassalkovich family at Gödöllő on grounds of bad behaviour. He had been heard swearing, had been rude to his parents and had not attended church. His neighbours and the parish priest affirmed the young man's delinquent conduct to the village elders.⁴⁷ They gathered a dossier that they sent on to the court after which the young man was gaoled. In similar fashion, the County Court of Ugocha (Ugocsa) determined in 1809, in respect of one nobleman, that 'there was no hope of his moral improvement' and that for his scandalous life of fornication, profanity and drunkenness he should forfeit his tongue.⁴⁸ Elsewhere, courts made the presumption that certain types of activity were criminal, having regard only for what they considered the right and proper manner of doing things. A young woman, who had dressed up as a man in order to gain employment as a labourer, thus received a beating from the county court of Heves, and the instruction that she be henceforth appropriately

⁴⁴ Hajdú, *Bűntett és büntetés*, p. 83.

⁴⁵ Matthias Vuchetich, *Institutiones Iuris Criminalis Hungarici*, Buda, 1819, pp. 78–79.

⁴⁶ Sápi, 'Községi biráskodásunk', p. 470.

⁴⁷ PML, IV – 87b, Úriszéki iratok, Gödöllői Grassalkovich uradalom, Box 1, *Fenyitő iratok*, 1838, no. 46.

⁴⁸ MOL O9, *Protocolla Tabulae Regiae. Causae Criminales*, 1809, pp. 16–17. The Royal Table mitigated the punishment.

clothed.⁴⁹ An elderly man, returning from the tavern, was so drunk that he did not notice that his equally inebriated companion had collapsed in the snow and so had frozen to death. He received a month in gaol and a beating for his neglect.⁵⁰ In both cases, the act of which the accused was charged fell into no recognizable category of offence but was deemed nonetheless an infraction that merited chastisement. By the same token, offences that had long fallen into desuetude might suddenly be recalled, as in the case of twenty peasants in Trenčín (Trencsén) County, convicted in 1782 of the antique crime of incitement to apostasy (notwithstanding the Edict of Toleration published only the previous year).⁵¹

Penalties were severe, but rarely exacted in their full measure. Just as the content of the law was to an extent communally derived, so punishments tended to be influenced by what the community knew of the culprit and of his circumstances.⁵² In respect of the young man from Pest County, the village elders soon regretted their role in bringing him to court. His imprisonment had left his wife and children destitute and thus a drain on the public purse, and so the elders petitioned for his release.⁵³ Compassion and a reluctance to overburden the community will explain why many courts were anxious to establish mitigating circumstances — the youth or infirmity of the offender, his intoxication, mental illness and so on. A concern for expense also meant that penalties other than imprisonment were preferred — acts of public disgrace or of stigmatization (the pillory or shaving off the moustache), fines, beatings, barge-hauling, road repair and so on. Extravagant penalties (as for instance suspension by the hair), even though justified by reference to local custom, might, however, result in the judges themselves being arraigned.⁵⁴ It was only where the culprit was a habitual offender or had greatly antagonized the community by their conduct over a long period that the death penalty was imposed — thus in one case from the 1780s, 'because he has spent his entire life drinking, squabbling and quarrelling'.⁵⁵ Remarkably, therefore, the annual number of recorded executions in Hungary in the 1770s was about sixty.⁵⁶ Although

⁴⁹ Hajdú, *Bűntett és büntetés*, p. 115.

⁵⁰ Ibid., p. 189.

⁵¹ Ibid., p. 40.

⁵² Sápi, 'Községi biráskodásunk', p. 472.

⁵³ PML, IV-87b, Úriszéki iratok, Gödöllői Grassalkovich uradalom, Box 1, *Fenyitő iratok*, 1838, no. 46. See also, *ibid.*, Box 1, file labelled 'Hrubos Pál' (1837); *ibid.*, Box 1, *Fenyitő iratok*, 1838, nos 29, 46.

⁵⁴ Kállay, *A magyarországi nagybirtok kormányzata*, p. 253.

⁵⁵ Hajdú, *Bűntett és büntetés*, p. 203, in respect of an 'enhanced' sentence of death.

⁵⁶ *Ibid.*, p. 117. The low figure does, however, comport with Schram's 'guesstimate'

we may presume that there was under-reporting, the figure suggests that Grünwald's image of a gallows-infested countryside is profoundly misleading.

Hungary's lower courts thus tended to render a justice that was communally derived. The law of custom, in the sense of social practice and traditional observance, was adhered to where it was explicit. Where the law was unsure, communal norms were invoked or recourse had to opinions more widely held, particularly in respect of crimes and their punishment. The composition of the courts reflected the need to ground judgements on some measure of popular approbation. Accordingly, where difficulties arose in determining justice or the law, the court's membership was broadened, to the extent of enlarging it to include the whole community. Even in respect of the courts of the county, where justice was increasingly professionalized, decisions might still be referred to assemblies of noblemen and others, and their collective understanding of the law determine its substance and application.

The Courts of the Curia

The court of the Royal Table developed out of the principal royal conciliar court that was known in the fifteenth century as the 'court of the royal personal presence'. Its president remained the *Personalis* or 'judge of the personal presence' (*személynök*), who had originally substituted for the monarch in cases proceeding before the Table. As the principal court of the privileged orders, its membership drew on representatives of both the common and upper nobility as well as of the clerical estate. The greatest prestige was attached to the court's several prelates and barons who sat closest to the *Personalis* and spoke last in deliberations. These, respectively canons of the church and members of the higher nobility (but not necessarily barons in the sense of holders of high royal office), had not usually received any formal education in the law. What they knew derived from practical experience and past judicial service. The court's other members comprised *jurisperiti*, who had either worked previously in the county administration or had studied law at college or university.⁵⁷

of about 500 executions for witchcraft in the two and half centuries prior to the crime's abolition in 1768. See Ferenc Schram, *Magyarországi boszorkányperek 1529–1768*, 3 vols, Budapest, 1970–82, 3, p. 91.

⁵⁷ Law was taught at Trnava (Nagyszombat) from 1667. The university was transferred to Buda in 1777 and removed to Pest in 1784. During the eighteenth century, law was also taught at Eger and Pécs, and at the Protestant colleges of Lučenec (Losonc), Kežmarok (Késmárk), Sibiu (Nagyszében), Debrecen, Bratislava (Pozsony), Banská Štiavnica

Of these the most important in terms of their function were the referring judges (*assessores referentes*) who prepared the cases for discussion, and the protonotaries and vicegerents of the Palatine (*Nádor*) and High Judge (*Országbíró, Júdex Curiae*), to whose superior knowledge of the law the court usually deferred. These were mostly recruited from the ranks of the common nobility. The court was also attended by the Public Prosecutor (*Director Causarum Regiarum*), who was there to represent the interests of the crown but who might also lead the proceedings in criminal cases.⁵⁸ Each of these might participate in discussions and cast a vote, with the exceptions of the Public Prosecutor, who might not act in judgement where the monarch could directly profit from the outcome, and the two prelates who customarily absented themselves from criminal matters. There were thus altogether around twenty judges normally in attendance at sessions of the Royal Table. The jurisdiction of the Royal Table extended to most actions involving noble property rights, which proceeded there as a court of the first instance, and for appeals in criminal cases involving nobles that had been sent up from the counties. By the early 1790s, the Royal Table might also hear appeals initiated by peasants in respect of both criminal and civil actions.⁵⁹

The Table of the Seven operated as the appeal court for the Royal Table. Its president was in theory the Palatine or Regent (*Locumtenens*), but he was usually too busy to attend and the river crossing from the palace in Buda to the Curia building in Pest was in any case dangerous for part of the year. His place was usually taken by the High Judge. Only in the second half of the eighteenth century were High Judges appointed who had any legal expertise, their predecessors having been for the most part superannuated soldiers. The Table of the Seven had in the seventeenth century consisted, as its name suggests, of seven judges — the palatine, three prelates and three barons. Over the course of the eighteenth century, its membership expanded to include up to five prelates, eight high-ranking nobles and as many as fourteen other judges. In contentious matters, when all judges were expected to attend court, there might be insufficient

(Selmecbánya), Sárospatak and Prešov (Eperjes). Five additional colleges were founded by Maria Theresa in the 1770s. See Katalin Gönczi, 'Jogászképzés a királyi akadémiákon a felvilágosodás korában és a reformkorban', *Jogtörténeti Szemle*, 2006, no. 2, pp. 1–3; Balázs, Krász, Kurucz, *Hétköznapi élet*, p. 108.

⁵⁸ László Nánási, 'Ügyészek a rendi Magyarországon', *Jogtörténeti Szemle*, 2009, no. 3, pp. 34–38 (pp. 35–36).

⁵⁹ For the organization and development of the Curia courts, see Endre Varga, *A királyi curia 1780–1850*, Budapest, 1974; Bónis, Degré, Varga, *A magyar birósági szervezet*, pp. 111–14.

seating space.⁶⁰ There was, however, considerable overlap between the two courts of the Curia. In particular, the referring judge or protonotary who had originally prepared the case for discussion at the court of the Royal Table was also responsible for presenting it anew to the Table of the Seven in the event of its appeal. As a consequence, the Table of the Seven usually allowed itself to be led by the decision first given and its discussions were evidently perfunctory. It was not unusual for the Table of the Seven to get through scores of appeals in a day, particularly at the start of the judicial terms when a backlog of cases had built up.⁶¹ Both courts also shared a specialist assessor knowledgeable in mining law. In the 1840s, a separate court of the Curia — the *Váltófőtörvényszék* — was established for litigation involving bills of exchange (*Váltó*, *Wechsel*), but with a remit that extended to adjudication of the securities on commercial loans and to proceedings for bankruptcy. The court consisted of experts in commercial law and dealt with cases appealed from either lower level bill of exchange courts (of which there were eight) or from town and county courts.⁶² Cases that came before the Curia's *Váltó* court might, however, be appealed to either the Royal Table or the Table of the Seven, depending upon which was the less busy at the time.⁶³

During the early 1720s, branches of the Royal Table were established in the provinces, at Trnava (Nagyszombat), Kőszeg, Prešov (Eperjes), Oradea (Nagyvárad) (thence to Debrecen in 1725) and, in Croatia-Slavonia, at Zagreb. These new courts were intended to replace the 'wandering protonotaries' who in concert with local assessors had previously dispensed an itinerant justice in the countryside on behalf of the Curia. Whereas, however, the protonotaries had not possessed a full authority but required the Royal Table to approve the verdicts of their courts, the new Provincial Tables had the right to issue judgements and they did not need to refer their decisions.⁶⁴ The jurisdiction of the provincial courts was, however, restricted to civil disputes between nobles, mostly involving actions for debt, suits over properties that lay in more than one county, and cases

⁶⁰ Ferenc Kazinczy, *Fogságom Naplója*, Budapest, 1976, p. 29.

⁶¹ *Sententiae in Excelsa Curia Regia*, Pest, 22 August 1822, 10 January 1825, 12 November 1827.

⁶² For cases being moved directly from the towns and counties, see MOL, O52, *Váltófőtörvényszék*, vol. 4, pp. 16–21 (seven examples) and *passim*. Most of the records of the *Váltófőtörvényszék* were destroyed by enemy action in 1956.

⁶³ Varga, *A királyi curia*, p. 203.

⁶⁴ Protonotaries did not, however, require a mandate to hear an action. See MOL, O3, *Mandata Judiciaria*, 1654, fols 350–84. Cf. János Marschalkó, 'Bírósági szervezet', in Dezső Márkus (ed.), *Magyar Jogi Lexikon*, 6 vols, Budapest, 1898–1907, 2, pp. 88–118 (p. 106).

involving widows, orphans and wards, and it remained possible to appeal a judgement from a Provincial Table to the Royal Table. The number of judges present at any one session seldom exceeded six.⁶⁵ Even though individual actions, as for instance over a contested will, could consume a whole day, by the end of the eighteenth century individual Provincial Tables might still be processing 500 cases a year.⁶⁶ The authority of the provincial courts was briefly expanded in the late 1780s when, as a consequence of Joseph II's reforms, they began to function as appeal courts for the short-lived *judicia subalterna* that now operated at the lowest level of the new structure of royal courts, having taken over much of the work of the county and seigneurial courts. With the abandonment in 1790 of Joseph's experiment, the provincial courts returned to their former role, as subordinate branches of the Curia, with a circumscribed authority.⁶⁷

The judges of the Curia courts were formally appointed by the ruler. This was inevitable to the extent that the Curia courts were royal courts and, perhaps more importantly, that the Treasury needed a letter from the Chancellery in order to start paying a judge's salary. The presidents of the Royal Table and Table of the Seven, respectively the Personalis and (de facto) the High Judge on behalf of the Palatine, were invariably distinguished by the long service to the ruler that they had exhibited, having usually spent extended periods in Vienna, frequently working in the Hungarian Chancellery there. High Judges were by the time of their preferment often in their sixties; the Personalis judges a decade or so younger. The ruler took an active interest in appointment to both offices, not least because the Personalis was also president of the Lower House of the Diet. In respect of the other judges of the Curia, the ruler was less concerned, even though the protonotaries acted as clerks to the Diet and were responsible for drawing up and editing the replies and resolutions of the Lower House.⁶⁸ The monarch was usually content to allow individual judges to appoint the protonotaries and their own vicegerents and for the court as a whole to select the other judges in attendance. Indeed, when Francis II sought in 1818 to block the appointment of a protonotary on the

⁶⁵ János Marschalkó, 'Kerületi Táblák', *Magyar Jogi Lexikon*, 4, pp. 692–93.

⁶⁶ MOL, O116, Dunantúli Kerületi Tábla. *Tanácsülvéi jegyzőkönyvek*, 13 (1797), p. 20; *ibid.*, 14 (1798), p. 78.

⁶⁷ István Stipta, *A magyar birósági rendszer története*, Debrecen, 1998, p. 70; Éva H. Balázs, *Hungary and the Habsburgs 1765–1800: An Experiment in Enlightened Despotism*, Budapest, 1997, pp. 232–33.

⁶⁸ István M. Szijártó, 'The Diet: The Estates and the Parliament in Hungary, 1708–1792', in Gerhard Ammerer et al. (eds), *Bündnispartner und Konkurrenten der Landesfürsten? Die Stände in der Habsburgermonarchie*, Vienna and Munich, 2007, pp. 151–71 (p. 161).

grounds that he was a Protestant, an almighty fuss arose. The Personalis first questioned and then refused to implement the instruction, and it was only at the third time of asking that he gracelessly submitted.⁶⁹

Except for the barons and prelates of the Curia, most of the judges were trained lawyers who had begun their careers in the counties or the royal service. Judicial office in the Curia proved an invaluable launching position for further advancement. József Ürményi (1741–1825), having studied law at Vienna and Trnava (Nagyszombat), worked to begin with as a lawyer in the royal service and then as a protonotary of the Royal Table. Thereafter, he was promoted to the Chancellery, pushing through the enlightened reforms of education and of administration undertaken by Maria Theresa and Joseph II. He was subsequently appointed Personalis of the Royal Table (1789–95) and, after a period of disgrace, High Judge (1806–25), an office that he held until well into his eighties.⁷⁰ Ürményi's contemporary, László Melczer (1755–1827), who came from a middling noble family in Šariš (Sáros) County, began employment in the county administration before moving in his twenties to the office of protonotary. Thereafter, he was appointed a county *alispán*, returning in the 1790s to membership of the Curia, as a judge on the Table of Seven.⁷¹ His son, István (1810–96), having acquired a degree in law, also started in county service, subsequently joining the office of the Public Prosecutor before becoming a judge on the Royal Table in 1842 and, eventually, Personalis in 1861.⁷² The careers of the two Melczers, as indeed the biographies of other leading judges of the Curia, demonstrate that there was no obvious contradiction between judicial office in the counties, traditionally viewed as hotbeds of noble resistance to the ruler, and a high position in the royal courts.

Just as the ruler generally acquiesced to the Curia courts in the matter of judicial appointments, so he or she generally refrained from interference in the conduct of cases. Certainly, there are plenty of bundles of surviving royal rescripts, mandates and *normalia* that bear witness to the ruler's concern with the activity of the courts. Most of their contents, however, are far removed from the so-called *benigna rescripta* of historical legend, the supposed instruments by which the ruler manipulated the outcome of cases for political purposes.⁷³ Most, in fact, deal with routine business

⁶⁹ Varga, *A királyi curia*, pp. 162–63.

⁷⁰ Sándor Pruzsinszky, *Ürményi József*, Budapest, 1990.

⁷¹ István Bakács, *Kisebb családi és személyi fondok* (MOL P szekció), 4 vols, Budapest, 1968–76, 4, ad loc.

⁷² *Magyar életrajzi lexikon*, 2 vols, Budapest, 1967–69, 2, p. 186.

⁷³ Béni Grosschmid, *Magyar előadásak. Jogszabálytan*, Budapest, 1905, p. 127; László Péter, 'The Autocratic Principle of the Law and Civil Rights in Nineteenth-Century

— questions relating to legal education, salaries and pensions, the cost of wood for the Curia's stoves, the theft of money by a local attorney and so on. We will certainly notice occasions where the ruler, working through the Chancellery, urged the Curia courts to hasten their deliberations, lifted a case to the Table of the Seven to close off the opportunity for it to be delayed still further by appeal, or moved to the Curia a case from a county court because a fair trial could not be guaranteed there. Very occasionally, we may spot a judgement being quashed or a case removed entirely from the Curia and sent by royal order to the Chancellery for adjudication. (Cases so moved were judged by equity, but no separate law of equity emerged). In nearly all these cases, however, legal grounds for the interference were given.⁷⁴ Equally, though, the Chancellery frequently addressed the Curia for advice in matters where the law was uncertain or in order to gather its opinion on new legislation.⁷⁵ Certainly, in the 1790s and, again, in the 1830s the Curia was coerced by the ruler and Chancellery to adjudicate cases of treason which had a strong political content, and it was pressed to adopt procedures that were manifestly unjust to the defendants (most notably, restricting legal counsel and limiting the defendants' right of reply). Even so, as in the 'Jacobin' trials of 1794–95, the Curia judges showed a strong independence, prolonging the proceedings so that the evidence might be fully tested, permitting the defendants opportunities to reply normally, notwithstanding the Chancellery's instructions, and throwing out cases where the evidence was thin. Of the forty-nine alleged Jacobins against whom the Public Prosecutor brought charges, the Royal Table convicted only fourteen.⁷⁶ The stubbornness of the Curia is likely to have been at least one reason why at the end of the trials Francis II sacked both Ürményi and Károly Zichy as Personalis and High Judge respectively.⁷⁷

Hungary', *CEU History Department Yearbook*, 1997–98, Budapest, 1999, pp. 11–34 (pp. 13, 31). See also, Marczali, *Hungary in the Eighteenth Century*, pp. 331–32.

⁷⁴ MOL, O11, *Rescripta Regia (Ad Septemviralem)*, Bundle 1, fols 29, 91, 109; *ibid.*, Bundle 2, fols 104–14, 159, 237, 283, 285, 512, 518; MOL, O10, *Normalia*, Bundle 2, fols 6, 20. *Ibid.*, Bundle 3, fols 13ff, 41ff contains extensive material on the Curia's stoves and the entitlements of the judges to tinder. The Chancellery also gave instructions to the Provincial Tables. See MOL, O111, *Dunántúli Kerületi Tábla Levéltára, Szabályrendeletek, ügyviteli iratok*, 1797–98, nos 114, 253.

⁷⁵ MOL, O11, *Rescripta Regia (Ad Septemviralem)*, Bundle 1, fols 83, 241, 327; *ibid.*, Bundle 2, fols 169, 490 (to determine on which day the feast of St Gerard should be held); O10, *Normalia*, Bundle 3, fol. 111.

⁷⁶ Kálmán Benda, *A magyar jakobinusok. Iratok, Levelek, Naplók*, Budapest, 1957, pp. 206, 311–15; Vilmos Fraknói, *Martinovics és társainak összeesküvése*, Budapest, 1884, pp. 346–64; Kálmán Benda, *A magyar jakobinusok elleni felségsértési és hűtlenségi per iratai 1794–95 (A Magyar Jakobinusok, 2)*, Budapest, 1952, pp. 378–410.

⁷⁷ Both were dismissed simultaneously at the end of July 1795. See Zoltán Fallenbüchl,

The treason trials of the 1790s were unusual because this was the first time that the Curia actually saw and interrogated criminal defendants, previous cases of treason having been tried by special courts.⁷⁸ Criminal cases only otherwise came before the Curia by route of appeal and the judges confined themselves to an examination of the paperwork. Large numbers of civil cases proceeded, however, before the Royal Table as a court of the first instance and their adjudication followed closely the Romano-Canonical model of civil procedure. Rather than being a concentrated event, the trial proceeded episodically and its leisurely pace gave opportunities for the parties to settle out of court or, even, with the judges' assistance, in court.⁷⁹ The first act was the laying of the plaint, followed by the summons, the gathering of evidence and the exchange of paperwork. The second was when the matter came to court and was opened (*Levata*), in a public act that often took place in the church next to the Curia building.⁸⁰ Thereafter, the court went into closed session. Initially, the lawyers representing the parties fought over the *exceptiones*, with counsel for the respondent or *incattus* (the *in causam attractus*, also abbreviated to *inctus*) seeking to have the case thrown out or delayed on grounds of procedural or other error. The main part of the trial comprised the period of *allegationes*, wherein the various claims of the plaintiff or *actor* were expounded with the *incattus*'s lawyer replying in turn. Usually, only four exchanges were permitted, but on occasions this number might be considerably exceeded.⁸¹ Individual points of law might be settled with interim adjudications or the case postponed for further evidence or documentary proof to be gathered. Only rarely was evidence taken directly from the parties or from witnesses. Proceedings might, moreover, be confused by the appearance of third parties in the action (the so-called *ingerentes*), by the need to summon warrantors (*evictores*) in cases of disputed sale, and by the bundling together of plaints, each

Magyarország főméltóságai 1526–1848, Budapest, 1988, pp. 73, 108. Ürményi's enemies had, however, been long plotting his downfall.

⁷⁸ Varga, *A királyi curia*, pp. 96–99.

⁷⁹ Ibid., p. 232.

⁸⁰ In the Church of the Franciscans, *in solito celebrandarum sessionum loco*. See MOL, O9, *Protocolla Tabulae Regiae*, 59, 1817, p. 210. Sessions of the Court of the Seven were also customarily opened there. See MOL, O8, *Protocolla Tabulae Septemviralis*, 10, 1800, p. 1.

⁸¹ MOL, O18, *Processus Tabulares*, Bundle 4, no. 14. Repeated attempts by the ruler to reduce the number of exchanges to three failed, which is a comment in itself on the inability of the crown to influence court practice, notwithstanding its claim to an *Aufsichtsrecht*. See János Zlinszky, *Az ügyvédség kialakulása Magyarországon és története Fejér megyében*, Székesfehérvár(?), 1976(?), pp. 27–30; Ignác Kassics, *Enchiridion seu Extractus Benignarum Normalium Ordinationum Regiarum*, 3 vols, Pest, 1825, 1, p. 101.

of which required a separate adjudication. A review of Curia procedures undertaken in the early 1790s thus disclosed fifteen separate stages in an action following on from the *Levata*.⁸² Although cumbersome and bureaucratic, the episodic character of adjudication had the advantage that, should the need arise, court procedures might effectively be disassembled and the constituent stages of the action initiated at a distance through judicial instructions. This was, indeed, the usual manner by which the Curia courts had operated during periods of turmoil in the seventeenth century.⁸³

Upon the conclusion of debate between the lawyers, the judges privately deliberated upon the verdict, which was then formally announced. Grounds for appeal were seldom denied by the court of the Royal Table and the opportunities for forcing a retrial were also many.⁸⁴ The frequency with which cases were appealed to the Table of the Seven or retried by the Royal Table suggests that appeal and retrial should be seen as stages in the action and not as separate events in litigation. Given the prolonged procedures of the Curia courts, it is unsurprising that by the 1820s the Royal Table had a backlog of more than 4000 cases.⁸⁵ It should, however, be noted that cases once begun might yet be suspended immediately or even halfway through by the plaintiff, but still kept on the record as *Levata*, thus imposing a constraint on the *incattus* in regard to the issue under dispute. In cases involving land, this had the consequence of preventing the *incattus* from disposing of his property until such a time as the case was terminated, which might of course never happen.⁸⁶ In 1817, the Curia removed from the active record some categories of action that belonged to this type, consigning them to the archives. Their surviving content runs to more than 140 bundles of documents.⁸⁷

⁸² MOL N105, Deputatio Regnicolaris in Juridicis, Lad. MMM, fasc. 5, *Ordo Processualis in xxviii sectiones digestus*, given in fols 281 ff. The twenty-eight parts of the *Ordo* include preliminary and appeal procedures.

⁸³ For the use of judicial mandates, see György Bónis, *A birósági szervezet mejújítása III. Károly korában (Systematica Commissio)*, Budapest, 1935, pp. 37–38.

⁸⁴ Discussed in Martyn Rady, 'Hungarian Procedural Law and Part Two of the *Tripartitum*', in idem (ed.), *Custom and Law in Central Europe*, Cambridge, 2003, pp. 47–70 (pp. 65–69).

⁸⁵ Varga, *A királyi curia*, pp. 110, 117.

⁸⁶ MOL, O18, *Processus Tabulares*, Bundle 4, nos 14, 17, 18, 19; discussed in Rady, 'Hungarian Procedural Law', p. 61.

⁸⁷ Endre Varga and Miklós Veres, *Birósági levéltárak 1526–1869*, Budapest, 1989, pp. 94–96.

Decision Making and the Curia

Although the period of the *exceptiones* and *allegationes* took place in closed session, the lawyers of the parties and the litigants were in attendance and minutes were kept by a notary (*protocollista*) attached to the court. In preparing the case for adjudication, excerpts were taken from the record by the referring judge or by a protonotary appointed to this task, who coupled them to notes of the various documents adduced in the course of the proceedings. In any one case, there might be several hundred separate supporting items — maps of properties, genealogies (sometimes going back to the thirteenth century), transcripts of deeds and so on. The dossier that the referring judge or protonotary compiled provided the material upon which the Curia judges reached their verdict.⁸⁸ The verdict of the court constituted a matter of public record and was accordingly entered into the court protocol together with the text of the plaint and a list of judges in attendance. Indeed, during the 1790s, and for reasons that are uncertain, the Curia sometimes caused the dossier to be extracted and printed, but this initiative was soon abandoned.⁸⁹ Verdicts were frequently collected by the lawyers in attendance in the expectation that their study might over time disclose the manner of judicial thinking in the Curia.⁹⁰

Whereas the laying of the plaint and the verdict were given publicly, the discussions leading up both to the interlocutory adjudications and to the final verdict were not only reached privately but were also unminuted. Nor did the verdict, as entered into the protocol, disclose the grounds for the court's decision. Although on occasions the verdict might recall one of a number of legal authorities, for the most part the decision of the judges was a bald *Deliberatum est, quod [...]*. Their judgement was, moreover, almost always given collectively, as a unanimous decision.⁹¹ Even with actions of apparently signal importance, where we might otherwise have expected the grounds to have been announced, the verdict was still unmotivated.⁹²

⁸⁸ The class is described in Varga, Veres, *Birósági levéltárák*, pp. 133–37.

⁸⁹ The printed dossiers are bound in a single volume with the title *Extractus Causarum in Tabula Regia*, now held in the British Library (Printed Books S. 195/2). I am not aware that any of this material has survived in Hungary.

⁹⁰ OSzK, MSS, *Norma Processualis*, Qu. Lat. 2085, *passim*; ibid., *Notationes circa Processum Iudiciorum*, Fol. Lat. 1869, fols 121–153.

⁹¹ Unlike the Provincial Tables, where majority verdicts were recorded. See MOL, O116 Dunántúli Kerületi Levéltára, *Tanácsüési jegyzökönyvek*, vol. 13 (1797), p. 26; ibid., vol. 14 (1798), pp. 24, 46, 66. I have, however, found one case where the Court of the Seven's determination proceeded by a *pluralitate votorum* (MOL, O8, *Protocolla Tabulae Septemviralis*, 1 [1791], p. 28).

⁹² MOL, O39, *Decisiones Curiales*, vol. 38, Part 2 (1773), pp. 908–10, 932.

There was nothing unusual or sinister about the Curia's silence. Historically, most civil law courts have not disclosed their grounds; nor, still today, do Common Law juries. Indeed, inscrutability made good sense, limiting the opportunity for a judgement to be voided on a technicality or the basis of a decision ridiculed. For litigants and their lawyers, it was, however, frustrating, for it made the judicial process unpredictable. Additionally, by hiding their reasoning and by maintaining the fiction of judicial unanimity, the Curia courts gave no hint to the losing party as to the wisdom of an appeal or retrial (which doubtless explains why so many unsuccessful litigants pressed on with these, disregarding time and money). Since lawyers and their clients had little indication as to what might be reliably thought to move the judges' thinking, they commonly presented as many arguments as possible, hoping that at least one would be found compelling. The impenetrability of judicial thinking may explain why one Jacobin deemed it worthwhile at his trial to advance Ferguson and Blackstone as potentially persuasive authorities!⁹³ Although the reluctance of judges to disclose 'their principal grounds and reasons' remained a complaint of both the ruler and the Diet, court decisions continued to remain unmotivated until the second half of the nineteenth century.⁹⁴

Notwithstanding the inscrutability of the Curia's decision making, it is possible to establish the sources upon which the judges relied in reaching their verdicts and some of the factors that influenced their deliberations. Although in their procedures the courts of the Curia followed the Romano-Canonical *Ordo Juris*, in respect of substantive law they did not rely upon Roman Law and civilian traditions. On account of its relative isolation from larger European trends, Hungary did not experience a Romanist reception in the sixteenth century.⁹⁵ Nor was there a tradition of referring to university faculties for guidance.⁹⁶ Indeed, there was little jurisprudential literature available other than textbooks and manuals of procedure. The preeminent sources of authority upon which the Curia

⁹³ Benda, *A magyar jakobinusok elleni felségsértési és hütlenségi per iratai*, pp. 388–89.

⁹⁴ Béni Grosschmid, *Magánjogi előadások*, pp. 718–19; Varga, *A királyi curia*, pp. 231–32.

⁹⁵ On Roman Law influence in Old Hungary, see Gábor Hamza, *Wege der Entwicklung des Privatrechts in Europa*, Passau, 2007, pp. 126–28; Beňa and Gábriš, *History of Law in Slovakia*, pp. 59–67; János Zlinszky, 'Legal Studies and Works of János Baranyai Decsi', in *'Igniculi Sapientiae'*, *János-Baranyai-Decsi Festschrift*, ed. Gábor Barna et al., Budapest, 2004, pp. 104–14 (pp. 104–05).

⁹⁶ The Sibiu (Nagyszeben, Hermannstadt) court of the Saxon *Universitas* in Transylvania did, however, address the faculties of Vienna and Leipzig for advice. See Heinrich Herbert, 'Die Rechtspflege in Hermannstadt zur Zeit Karls VI', *Archiv des Vereines für siebenbürgische Landeskunde*, NF, 27, 1896, pp. 39–161 (pp. 128–45).

judges relied were not therefore the laws of Justinian but the statutes of the Diet and Werbőczy's *Tripartitum* of 1517. The statutes of the Diet had been published from the sixteenth century in successive editions of the *Corpus Juris Hungarici*. Although the text of the *Corpus* was defective, its contents had, along with its misprints, acquired a large measure of authority through use.⁹⁷ Although in origin a collection of customary law, Werbőczy's text was deemed to have a similarly enduring authority and was thus conventionally known as 'the *Decretum*'. Substantial parts of the *Tripartitum* had, however, been nibbled away by statutes of the Diet, while other, more technical portions had long fallen into abeyance. Nevertheless, the continued authority of the *Tripartitum* is shown by its repeated re-publication (more than forty times by 1830), its rendering into verse or mnemonics so as to make its contents more memorable, and various commentaries which themselves acquired over time a customary authority of their own.⁹⁸

Neither the statutes nor the *Tripartitum* might be regarded, however, as comprehensive. During the eighteenth century, Diets met infrequently — altogether only nine times — and their output was correspondingly slender; indeed, the statutes agreed by individual Diets became progressively slimmer as the century went on. Moreover, the statutes of the Diet generally took the form of treaties between the ruler and the estates and thus had more of a political than legislative purpose. Indeed, the statutes that resulted from the bargaining of ruler and estates were not properly considered legislation until the close of the eighteenth century.⁹⁹ Additionally, much of the content of individual statutes consisted of what might be considered 'private bills', measures that affected only individual towns, corporations or families. For its part, Werbőczy's *Tripartitum* was thorough only in respect of the terms by which nobles held their land. Even so, its sixteenth-century text was plainly inadequate for deciding the increasingly convoluted entailments, mortgages and loans on land that came increasingly to distinguish property relations in Hungary over the

⁹⁷ J. N. Kovachich, *Notitiae Praeliminares ad Syllogen Decretorum Comitalium*, Pest, 1820, pp. 159–62; Andor Csizmadia, 'Previous Editions of the Laws of Hungary', in János M. Bak et al. (eds), *The Laws of the Medieval Kingdom of Hungary 1000–1301 (Decreta Regni Mediaevalis Hungariae, 1)*, 2nd edn, Idyllwild, CA, 1999, pp. xvii–xxxiii (pp. xxv–xxxi).

⁹⁸ Thus the *Tyrcinum* of János Szegedi, first published in 1734. See also, János Gyalakutai Lázár, *Versus mnemonici operis Decreti Tripartiti*, Sibiu, 1744; Ferenc Szentpáli Nagy, *Verböltzi István törvény könyvének compendiuma*, Cluj, 1798; János Okolyczai, *Tripartiti Operis Iurium Compendium*, Bardejov, 1636.

⁹⁹ István M. Szijártó, *A diéta. A magyar rendek és az országgyűlés 1708–1792*, Budapest, 2005, p. 31.

course of the eighteenth century. Attempts to modernize the *Tripartitum*, undertaken in the 1720s and 1790s, served for the most part only to reorganize its contents, not to update the substance of its provisions, which remained frozen in their late medieval form.¹⁰⁰

There were several approaches to the gaps in the law. The first was to rely on judgements upon legal maxims, and several handy lists deriving from Canon and Roman Law were included in successive editions of the *Corpus Juris Hungarici*. These were supplemented in the eighteenth century by epigrams deriving from Natural Law, as contained in Karl Anton Martini's *De lege naturali positiones* (1767; German edition, 1797).¹⁰¹ At the time, these 'brocards' were thought to be particularly persuasive and an important element in the making of Hungarian jurisprudence, but their lapidary content might be variously interpreted.¹⁰² It was more usual for the judges to work by analogy from the *Tripartitum* and the statutes and thus to update the law by a process of deductive reasoning. So, for instance, in the matter of whether a commercial contract should be notarized, the Curia decided that it was better to have this done, in the same way as it was better for a nobleman to have a coat of arms.¹⁰³ In respect of whether a debt owed on a bill of exchange could be pursued at law even if the bill had been returned to the borrower by the lender, the Curia affirmed that it might; in much the same way as a donation of land could in some circumstances be revoked, so the debt itself might still be recalled without judicial penalty even though the note had been returned.¹⁰⁴ As to whether inherited land could be put up as collateral on a loan, the Curia was adamant that it might not, for it presumed the possibility of the estate's alienation which was forbidden in the *Tripartitum*.¹⁰⁵

These decisions did not, however, constitute case law. In case law, individual judgements contribute to a rule that is worked out progressively

¹⁰⁰ Mária Homoki-Nagy, *A 1795. évi magánjogi tervezetek*, Szeged, 2004, pp. 13–18.

¹⁰¹ Gusztáv Wenzel, *Visszapillantás*, p. 28; see also, Imre Szabó, *A burzsaá állam- és jogbölcslet Magyarországon*, 2nd edn, Budapest, 1980, pp. 43–44.

¹⁰² János Szegedi, *Manuale Jurisperitorum Ungariae Continens Regulas Juris Patrii*, Győr, 1747, unpaginated introduction: *Magnam in Tribunalibus nostris obtineant authoritatem: inclinantque (deficiente Lege) Mentem Judicum, ad pronunciandum pro parte illa, cui allegatum Brocardicon rite applicabile est.*

¹⁰³ György Galántai Fekete, *Problemata juridica seu Quaestiones in causis*, ed. János Csaplovics, Bratislava, 1814, pp. 27–28. Fekete was High Judge between 1773 and 1783.

¹⁰⁴ *Problemata juridica*, p. 21. It was not the aim of this decision to allow any commercial contract to be voided if the cause was reasonable but instead to prevent the creditor being automatically convicted of vexation (*calumnia*).

¹⁰⁵ *Problemata juridica*, p. 72; Mária Homoki-Nagy, 'Az Osztrák Polgári Törvénykönyv hatása a magyar magánjogra', in Péter Antalóczy et al. (eds), *Kormányzás és kodifikáció*, Budapest, 2006, pp. 227–47 (pp. 238–39).

by successive judicial declarations. The courts of the Curia, by contrast, understood their role as being to bring out a rule that was latent within the existing sources of authority. Wherever possible, therefore, their judgements harked back to the original text of the source, not to a previous decision to the understanding of which their own and succeeding judgements gave additional explanation. In the mind of the Curia's judges, the law was not incrementally developed, added to and refined, but a text, the gaps in which might be filled in with their own decisions. Used and affirmed by successive judgements, these decisions became analogous to the text itself, as a final and definitive statement of the law. A subsequent generation of legal scholars would criticize Hungary's judiciary for not developing a method of case law analogous to the English Common Law tradition, and thus for leaving the law unrefined and incapable of rendering sophisticated judgements.¹⁰⁶ The starting points of the two systems were, however, quite different. The one sought to develop and shape a rule by successive judgements, and to establish its immanence; the other aimed to tease out the rule from within the text and to render the discovered rule final and fixed.

Until the end of the eighteenth century, judicial decisions were not recorded systematically. In some cases, decisions were extracted and retained in bundles both for future reference and for the benefit of students. Leading cases might also be retained in separate files, although these were often compiled with a view as much to the importance of the litigants as of the decision handed down by the court.¹⁰⁷ Although the surviving compilations seem almost haphazardly arranged, it was clearly possible for courts to locate at least some previous decisions relevant to the specific cases before them, including decisions more than half a century old.¹⁰⁸ During the 1760s, the Queen Empress pressed the Curia not only to publish the motivations of its decisions but also to undertake a comprehensive review of the law.¹⁰⁹ A committee of the Curia accordingly brought together more than a thousand plaints and decisions, culled from the court protocols of

¹⁰⁶ Gusztáv Schwarz, *Magánjogunk felépítése*, Budapest, 1893, pp. 18–23; Bernát Besnyő, Szászy-Schwarz Gusztáv emlékezete, Budapest, 1933, pp. 31–32; Ernő Wittmann, *Tanulmányok az angol magánjog köréből*, Budapest, 1907, pp. 5–14, 44–45, discussed in Martyn Rady, 'England and Hungarian Jurisprudence: Questions of Public and Private Law', in László Péter and Rady (eds), *British-Hungarian Relations since 1848*, London, 2004, pp. 315–27 (pp. 323–25).

¹⁰⁷ Varga, Veres, *Bírósági Levéltárak*, pp. 55–57.

¹⁰⁸ MOL, O30, *Perkivonatok Fogalmazványai*, Bundle 3, fols 1, 187–88, 457, 540; MOL, O39, *Decisiones Curiales*, 13, p. 642; *Problemata juridica*, p. 154.

¹⁰⁹ MOL, O11, *Rescripta Regia (ad Septemviralem)*, Bundle 1, fol. 166.

both the Royal Table and the Table of the Seven. After several decades of neglect, these were published in 1800 under the title *Planum Tabulare seu Decisiones Curiales* (Bratislava).¹¹⁰ The printed collection was augmented by a companion volume, *Nucleus Plani Tabularis*,¹¹¹ which extracted and summarized the decisions, arranging them under headings. Even so, the contents of the *Planum Tabulare* remained a muddle, a *casuistica* of randomly selected cases and decisions.¹¹² Nevertheless, a further volume of Curia decisions was published in 1823–24 and, after 1822, the Curia itself began to print selectively its own decisions, more or less for each day it was in session.¹¹³ The highly abbreviated form in which the Curia recorded its decisions, again (of course) without the motivation but often also without the plaint, doubtless rendered this as insufficient a resource for lawyers at the time as it is for historians now.¹¹⁴ Even at this late stage in its institutional history, the Curia failed to distinguish between court record and report.

Contemporaries remained uncertain whether the judicial decisions so published were as persuasive as statute law, thus ‘substituting for it until the Diet decides matters’,¹¹⁵ whether they needed repetition to make them binding, and whether they individually constituted a norm or a ‘yardstick’.¹¹⁶ In this respect, it is instructive that the 1869 law on the

¹¹⁰ The *Planum Tabulare* was reprinted in 1817 and a Hungarian translation by István Czövek published in 1825. See Endre Nagy and Lajos Rácz, *Magyar alkotmány- és közigazgatástörténet*, ed. Gábor Máthé, Budapest, 2007, p. 428.

¹¹¹ Bratislava, 1811, edited by János Csaplovics.

¹¹² The criticism is Ferenc Deák’s. See Homoki-Nagy, *A 1795. évi magánjogi tervezetek*, p. 12.

¹¹³ Stephanus Molnár de Péterfalva, *Sententiae Excelsae Curiae Regiae*, 2 parts, Pest, 1823–24; *Sententiae in Excelsa Curia Regia*, Pest, 1822 etc.

¹¹⁴ Thus, to take one typical record of a case that proceeded before the Royal Table in 1823, in the matter of János Kovács, natural father and guardian of Erzsébet Urbanovszky, against the *incattus* Pál Miklóssy (and that is all we are told of the parties and the plaint!): ‘The blood relationship with the deponent Emerentia Urbanovszky not being called into question, in respect of the joint ownership relating to the contested property listed under D., since the *incattus* did not furnish legal notice before the completion of sale on the property, we find for the plaintiff, and adjudge the contested property to him, and oblige the *incattus* to disclose as appropriate.’ In this instance, which is representative, it is difficult even to guess what the case is about, let alone the principle governing the judgement. It may, indeed, be a very important decision, granting the mother of a nobleman’s illegitimate daughter certain rights in respect of property over which he himself had a claim through inheritance. Or it may simply reaffirm the right of a relative to be notified of a property sale. We cannot tell. (*Sententiae in Excelsa Curia Regia*, 20 November, 1823).

¹¹⁵ Matthias Vuchetich, *Institutiones Iuris Criminalis Hungarici*, Buda, 1819, p. 23.

¹¹⁶ Ignácz Frank, *A közigazság törvénye Magyarhonban*, Buda, 2 parts, 1845–46, p. 89; Wenzel, *Visszapillantás*, p. 27; János Suhayda, *A magyar polgári anyagi magánjog rendszere*,

Exercise of Judicial Power left out the decisions of courts as one of the sources of authority to which judges should defer.¹¹⁷ Nevertheless, the decisions made by the courts of the Curia yielded over time a body of rules that constituted judicial practice, a *praxis* and *usus* that disclosed a specific manner of approaching legal problems. Inevitably, given the deductive methods of reasoning that the judges employed, moving from the text of a statute, a paragraph in the *Tripartitum* or a previous decision, to the facts of the case before them, the mood of the Curia and thus the constructions of its judges tended to be conservative. Reasoning by analogy in cases where the law was uncertain meant, in particular, that the judges conceded to almost all categories of noble land holding the same security of possession as inherited property, thus contributing to the immobility of the land market and to the prolongation of cases.¹¹⁸ Because, however, there was little by way of commercial law on which the judges could build — the first statutes regulating business and finance were only passed by the Diet in 1840 — the Curia was incapable of developing detailed rules of commercial contract and liability even by analogy.¹¹⁹ Likewise, on account of the underdevelopment of the legal idea of the corporation in Hungary, it failed to elaborate anything approaching a modern company law.¹²⁰ The judges were, however, only too well aware of the constraints under which they worked. In the 1760s, under pressure from the Chancellery to revise the laws, the judges of the Royal Table explained how the procedural law

Pest, 1862, p. 37; Imre Zlinszky, *A magyar magánjog mai érvényében különös tekintettel a gyakorlat igényeire*, 4th edn, ed. Sándor Dárdai, Budapest, 1891, pp. 36–37; Ferencz Raffay, *A magyar magánjog kézikönyve*, Prešov, 1904, p. 18; Alajos Degré, 'A Planum Tabulare keletkezésével kapcsolatos kérdések', in *Kolosváry Bálint Emlékkönyv*, Budapest, 1939, pp. 101–09 (pp. 107–08).

¹¹⁷ Judges were held to proceed and pass judgement on the basis only of 'the laws, decrees that have been proclaimed and that rest on the law, and on custom having the force of law'. See Gábor Máthé, *A magyar burzsoá igazságszolgáltatási szervezet kialakulása 1867–1875*, Budapest, 1982, p. 43.

¹¹⁸ As noted by the protonotary of the Palatine, Antal Brunsvik, in the 1750s. See Dénes Jánossy, 'Reformtörekvések a polgári peres eljárás terén a xviii. században', *Századok*, 77, 1943, pp. 41–77 (pp. 52–54).

¹¹⁹ Mária Homoki-Nagy, 'Az Osztrák Polgári Törvénykönyv hatása', pp. 242–43; Mária Homoki-Nagy, 'Bérleti szerződés a 19. század birói gyakorlatában', *Acta Juridica et Politica*, 69, 2007, pp. 263–83; János Zlinszky, 'Kodifikation und Gesetzgebung des allgemeinen Privatrechts in Ungarn', in Helmut Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 3 vols in 8 parts, Munich, 1973–88, 3, 2, pp. 2819–38, 2141–213 (p. 2824–46); Károly Szladits, 'Codificatio', in *Magyar Jogi Lexikon*, 2, pp. 346–55 (p. 552). Problems of liability in respect of failure to transport were a particular problem. See MOL, O98, *Acta Tavernici Antonii Cziráky*, Bundle 1, no. 105; *ibid.*, Bundle 2, no. 210.

¹²⁰ Wenzel, *Visszapillantás*, p. 40.

in particular might be improved in order to speed up the administration of justice, by eliminating some of the devices used by litigants to force retrials. For his part, the Personalis, Ferenc Koller, argued that reform of the *praescriptio* (period of limitation) might prevent rights to hereditary property being contested despite centuries of ownership in one family. Both solutions would, however, have had the consequence of overturning a good part of the procedural law contained in the *Tripartitum*, for which reason the reforms proposed required the statutory weight of the Diet. This was not, however, forthcoming.¹²¹

Where the Curia could act progressively and carve out its own legal space it did so. In respect of the criminal law, it adopted its own rules that worked towards the mitigation of penalties, hence its frequent recourse to the formula, 'The crimes in the charge having been committed without any violence etc.'¹²² Likewise, although it might quash decisions based on local custom where it deemed the custom followed to be unreasonable, it regarded as valid most local arrangements, whether communally derived or implicit within the actions of litigants. Thus, in one case proceeding before the Royal Table in the 1770s, the court found that the previous conduct of the parties, in this case the repayment of a pledge on land with a commercial bill of exchange, constituted a practice between them that overrode more widely followed conventions.¹²³ The readiness of the Curia to concede custom an authority in law permitted it to depart from the canonical texts to which it usually deferred. Thus, even though reluctant to allow inherited land to be used as security, the Curia nonetheless recognized the practice, allowing the land upon default to be placed under sequestration. (It was, however, another matter to have the counties enforce the sequestration order.)¹²⁴ Likewise, the Curia acknowledged such innovations as the bill of exchange as well as the mortgage (*hypotheca*) that reversed the standard arrangement of the pledge. Once having acknowledged the mortgage and sequestration, it then framed decisions on lending that gradually amounted to a body of practice. The Curia also

¹²¹ Jánossy, 'Reformtörekvések a polgári peres eljárás terén', pp. 57–61.

¹²² A vádbeli büntettek minden erőszak nélkül követtetvén el etc: *Sententiae in Excelsa Curia Regia, passim* from 1838. The records of the Curia slowly shifted from Latin to Hungarian after 1835.

¹²³ MOL, O39, *Decisiones Curiales*, vol. 39, part 2 (1774), p. 7.

¹²⁴ Béla Iványi-Grünwald, 'Gróf Széchenyi István Hitel című munkája. Történeti bevezetés', in *Gróf Széchenyi István összes munkái*, vol. 2, Budapest, 1930, pp. 1–264 (pp. 61–69, 230). See also, Béla Ivanyi-Grünwald, 'From Feudalism to Capitalism: The Economic Background to Széchenyi's Reform in Hungary', *Journal of Central European Affairs*, 20, 1960, 3, pp. 270–88 (pp. 281–83).

adopted basic rules of bankruptcy as they had developed out of customary observance in Hungary's villages and towns, and also to develop practices in regard to the award of damages that took into account considerations other than immediate material loss.¹²⁵ Moreover, even in the absence of statutory authority from the Diet, the Curia began to apply the period of limitation in a more generous sense to property rights, thus putting an end to some of the vexatious and opportunistic litigation that so blighted noble property holding.¹²⁶

Conclusion

Unlike Supreme Court Justices and Lords of Appeal, the judges of the Curia did not publish the grounds for their decisions, let alone dissenting opinions or minority reports. Nor, unlike judges in the United States, are they available to answer questionnaires on their conduct and thinking.¹²⁷ We can, however, establish the procedures that were used in the courts of the Curia, the written authorities on which the judges relied, the role that decisions played in the making of court practice, and the attitudes of the judges themselves in respect of some of the legal problems that they faced. We may aver, as the judges complained, that they were constrained by the written law and so obliged to preserve procedures that they would have preferred to abandon. We may, however, note that they were by no means impervious to change but were ready not only to make recommendations for reform but also to embrace innovation, particularly in respect of commercial law, bankruptcy, sureties on land and the period of limitation.

The Curia judges were restricted by the written law in what they might do. Hungary's lower courts were not so limited, for the written law impinged but little upon their decision making. The verdicts of village, seigneurial and county courts rested on collective notions both of what the law was and of how it ought to be. The judgements so obtained were as a consequence discretionary and not rooted in fixed rules of conduct. They were not, however, norms that were imposed hegemonically by the privileged orders, but were instead determined with a high degree of popular participation, particularly when the law itself was uncertain. The

¹²⁵ See thus, the Curia decisions given in respect of the sequestration of noble property in Lajos Keresztszeghy Szabó, *Váltó- és csőd-ügyekben keletkezett főtörvényszéki határozatok gyűjteménye*, Pest, 1845, p. 48. For bankruptcy and damages, see Wenzel, *Visszapillantás*, pp. 88–89.

¹²⁶ *Ibid.*, pp. 70–71.

¹²⁷ See here, Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, 'Blinking on the Bench: How Judges Decide Cases', *Cornell Law Review*, 93, 2007, 1, pp. 1–44.

need to gather opinion as to the content and application of the law meant that neither seigneurial nor county courts functioned as exclusively noble courts, administering justice on behalf of the privileged orders. Nor in their judgements were these local courts particularly bloodthirsty, except where crimes and offenders were egregious.

As was said of another notable work on the supposed failings of justice in Old Hungary, we may of Grünwald's brief discussion of the courts and judicial practice observe that he employed 'the method of the author of a veterinary textbook who depicts in a single illustration all the diseases that could affect a horse'.¹²⁸ Such would, however, be a generous verdict, for there is in Grünwald's account of Hungary's courts and of the villainous actions of their judges almost nothing true at all. Neither, however, may it be assumed of Hungary's judges that they were colourless functionaries who, in the manner of the typical civil law judiciary, mechanically dispensed verdicts deriving from a law that was comprehensive and certain. As has been recently remarked of the United States judiciary, so we may conclude of the judges of Old Hungary, particularly those who served in the Curia, that it is time historians started to consider the 'motivations and constraints on judges, and the judicial mentality that results' and no longer to imagine that 'judges were computers rather than limited human intellects navigating seas of uncertainty'.¹²⁹ Or perhaps, as Karl Llewellyn put it, 'Judges do not cease to be human because they wield a gavel', except that Hungarian judges usually bore a wand.¹³⁰

¹²⁸ Ferenc Deák of József Eötvös's *Falusi jegyző* (*The Village Notary*), 1844–46. See Loránt Czigány, *The Oxford History of Hungarian Literature*, Oxford, 1984, p. 171.

¹²⁹ Posner, *How Judges Think*, p. 377.

¹³⁰ Karl N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School*, New York, 2008, p. 31 (first published in 1930).